APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED DECEMBER 19, 2001

In The
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 00-3864

SOUTH AUSTIN COALITION COMMUNITY COUNCIL, *et al.*,

Plaintiffs-Appellants,

v.

SBC COMMUNICATIONS INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 99 C 7232 — **Blanche M. Manning**, *Judge.*

Submitted November 14, 2001* — Decided December 19, 2001

Before EASTERBROOK, KANNE, and EVANS, *Circuit Judges.*

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* This appeal has been assigned to the panel that resolved the initial appellate proceedings concerning this merger. See Operating Procedure 6(b). The panel has concluded that a second oral argument is not necessary.

Appendix A

EASTERBROOK, *Circuit Judge.* SBC Communications and Ameritech — two of the Baby Bells created by the breakup of AT&T in 1983 — merged in 1999 after receiving approval from the Federal Communications Commission and several state regulators. The Antitrust Division of the Department of Justice declined to file suit. But this did not deter the plaintiffs in this case, which have sued twice. The first suit, filed before SBC and Ameritech had obtained the necessary administrative approvals, was dismissed as premature. 191 F.3d 842 (7th Cir. 1999). This second suit, filed immediately after the approvals, has been dismissed for want of standing. 2001 U.S. Dist. LEXIS 9850 (N.D. Ill. June 22, 2001).

When the local-service subsidiaries of AT&T were spun off in the 1980s, most people assumed that local phone service is a natural monopoly. This was a premise of the divestiture, and each Baby Bell was constituted as a monopoly in its service area. By the time of the merger the technological basis of this natural-monopoly assumption had come into serious question, and the legal barriers to competition also were in the process of being dismantled. Thus the antitrust objection to the merger was based on potential rather than ongoing competition. The agencies were concerned — and in this suit the plaintiffs contend — that, had SBC and Ameritech not merged, each would have entered the other's core markets and created extra competition to consumers' benefit. The complaint alleges, for example, that but for the merger SBC would have begun to offer local phone service in Chicago (part of Ameritech's original territory), and Ameritech would be offering local service in St. Louis, an area assigned to SBC in the AT&T divestiture. The FCC

and the Antitrust Division concluded that, even if this is so, many other rivals remain — and that as a practical matter there is effective competition between land lines and cellular service, so that competition prevails even in markets that have a single land-line local-service provider. But official approval does not immunize a phone merger against private antitrust challenge; § 7 of the Clayton Act, 15 U.S.C. § 18, confers immunizing power on the Surface Transportation Board, the Federal Power Commission, and several other bodies, but not on the FCC or the Antitrust Division. So private plaintiffs are free to seek divestiture. See *California v. American Stores Co.*, 495 U.S. 271 (1990).

Plaintiffs allege that the merger has reduced long-run competition. This implies not only injury-in-fact (the core of the Article III standing requirement) but also "antitrust injury." That is to say, these plaintiffs complain about the *kind* of injury (reduced output and higher prices) against which the antitrust laws are directed. See *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Nonetheless, the district court dismissed the complaint for want of standing. The court's opinion summarizes at length the conclusions of the administrative agencies approving the merger and then states, without additional reasoning, that the allegations of the complaint are too "speculative and vague" to justify putting the administrative conclusions to the test. This approach has nothing to do with standing. Complaints need not be elaborate, and in this respect injury (and thus standing) is no different from any other matter that may be alleged generally.

See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The district court's approach amounts to a conclusion that the complaint fails to state a claim on which relief may be granted — and this is how SBC (the surviving firm in the merger) chooses to treat it. It does not attempt to defend the district court's standing rationale but argues instead that antitrust complaints must be more thorough than the normal civil complaint, the better to curtail the high cost of antitrust litigation by facilitating early disposition.

That is not correct. A pleading is sufficient if it contains

> (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.

Fed. R. Civ. P. 8(a). Plaintiffs' complaint does all of these things and may not be dismissed just because it does not do more. Rule 9 sets out special pleading requirements for some matters, such as fraud and admiralty, but it does not require extra detail for antitrust suits — and the Supreme Court insists that courts not add to the requirements of Rule 8. See, e.g., *Leatherman v. Tarrant County*, 507 U.S. 163 (1993); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); cf. *Crawford-El v. Britton*, 523 U.S. 574 (1998). Doubtless antitrust litigation is expensive, but Congress has not responded to this expense with extra pleading requirements — as it did, for example,

in the field of private securities litigation. See 15 U.S.C. § 78u-4(b). As long as Rule 8 stands unaltered, and there is no antitrust parallel to the Private Securities Litigation Reform Act, courts must follow the norm that a complaint is sufficient if any state of the world consistent with the complaint *could* support relief. See *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); see also, e.g., *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). It is not necessary that facts or the theory of relief be elaborated. See *Walker v. National Recovery, Inc.*, 200 F.3d 500 (7th Cir. 1999); *Bennett v. Schmidt*, 153 F.3d 516 (7th Cir. 1998). District courts may mitigate the expense of litigation by resolving motions for summary judgment early in the case — in advance of discovery, if appropriate, for summary judgment may be sought at any time. See Fed. R. Civ. P. 56.

Still, a pleader may volunteer enough to show that the claim cannot succeed, and then dismissal under Rule 12(b)(6) follows. See *American Nurses' Association v. Illinois*, 783 F.2d 716 (7th Cir. 1986). Plaintiffs have done just this by alleging that before the merger both SBC and Ameritech were regulated common carriers, each a monopolist of land-lines service in its assigned territory. Thus plaintiffs allege a diminution in *potential* competition, rather than a merger between firms currently competing in overlapping markets. And this is fatal to the suit, because an exception to § 7 of the Clayton Act carves out of its scope a merger of common carriers that do not directly compete. The critical portion of § 7 reads:

> Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws

> to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

15 U.S.C. § 18. Both SBC and Ameritech were common carriers. The last clause of this sentence allows "such common carrier" to "extend" its lines by merger, provided that "there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired." "[S]uch common carrier" must refer back to the introductory clause — a "common carrier subject to the laws to regulate commerce". Do telecommunications carriers meet that description? They are subject to many laws regulating interstate commerce, but the context of this phrase, with its reference to "branches or

short lines," coupled with the date of its enactment (1914), raises the possibility that it covers only railroads subject to the jurisdiction of the Interstate Commerce Commission (now morphed into the Surface Transportation Board). But that would not be the right reading, as we concluded in *Navajo Terminals, Inc. v. United States*, 620 F.2d 594 (7th Cir. 1979), when applying this language to a merger of motor carriers. Section 7 has a *separate* exemption for railroad mergers approved by the Surface Transportation Board; the sentence we have quoted thus would be surplusage if read as limited to railroads. And the legislative history — the *enactment* history, not the fog of words generated by legislators — shows that "common carrier" means *all* common carriers. The version of § 7 that passed by the House used the word "railroad"; the Senate amended this to "common carrier", a broader designation; the House acceded to the Senate's amendment. The Senate's committee report observed that this change was made precisely to "apply to any common carrier, thus including telephone and pipe lines". See Earl W. Kintner, *Legislative History of the Federal Antitrust Laws and Related Statutes* 1748, 2466 (1978), which collects this and related background material. We rely on the legislative deeds, not the accompanying explanation that restates the obvious. Understandably, in light of this history, plaintiffs do not contend that the phrase "common carrier subject to the laws to regulate commerce" is limited to those entities regulated by the Interstate Commerce Commission in 1914.

What plaintiffs do argue is that the world has changed since 1914. When § 7 was enacted, regulated common carriers rarely competed, and then did so only by sufferance of the agencies after securing certificates of public interest,

convenience, and necessity. Today most regulated industries, including telecommunications, have been deregulated in whole or in substantial part; the Telecommunications Act of 1996 plus the advent of wireless phone technology have brought competition to the local phone market, and plaintiffs argue that we should not read the exceptions to § 7 to reduce the force of this competition. The factual premise of this contention is doubtful. In 1914 railroad lines often competed; even when tracks were laid far apart, shippers had a choice of lines. Grain, livestock, and steel could go west from Chicago through St. Louis on the Union Pacific, or over the Northern Pacific lines through Minnesota and the northern tier, or could go by the Illinois Central (or barge down the Mississippi) to the Gulf of Mexico and then by ship through the Panama Canal. Competition among common carriers is not an invention of the late Twentieth Century. Even if competition among common carriers were a novelty, however, this would not affect the meaning of § 7. The world may have changed, but the statute has not. As the Supreme Court remarked in *National Broiler Marketing Association v. United States*, 436 U.S. 816 (1978), when dealing with an antitrust exemption dating to 1920, a change in economic conditions is a challenge to *Congress*, not the courts; and if the legislature leaves exemptions alone, they must be enforced as written. The Supreme Court has not embraced Judge Calabresi's proposal, see Guido Calabresi, *A Common Law for the Age of Statutes* (1982), that old enactments be treated no differently from common law, equally subject to judicial upkeep.

This leaves plaintiffs' argument that potential competition should be treated as "substantial competition

between the company extending its lines and the company whose stock, property, or an interest therein is so acquired" for purposes of § 7. Yet this would leave no work for the exemption to do. It would rewrite § 7 so that mergers of common carriers are exempt from scrutiny if and only if the merger would not violate § 7 in the first place. The only function of this exemption must be to distinguish potential-competition from actual-competition cases. If the merging common carriers do not compete actually *or* potentially, they face no antitrust risk. If they currently (and substantially) compete, then the exemption is inapplicable by its terms. Only potential competition remains to be affected by the exemption; this is the respect in which common carriers differ from, say, manufacturers or financial intermediaries. If two banks merge, the court must consider any reduction in potential competition as well as the reduction in ongoing competition. See, e.g., *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974). But if two common carriers merge, only the reduction in existing competition matters. That's all the exemption in § 7 does; to end its application to potential competition is to wipe the exemption off the books. Leaving potential competition among common carriers to agencies rather than juries is hardly such a surprising step that courts should struggle against the reading. Assessing the significance of potential competition is difficult for the best economists and would be nearly impossible as a subject for trial — especially when regulatory agencies exercise so much control over how common carriers interact.

Appendix A

Plaintiffs' complaint concerns potential competition, for it acknowledges that SBC and Ameritech had lawful monopolies in local land-line service at the time of the merger. What plaintiffs want the district court to examine is the economic effect of eliminating each Baby Bell as a potential entrant into the other's territory. That is exactly the line of inquiry that the common-carrier exemption to § 7 forecloses. Thus although we do not agree with the district court's opinion, its judgment may be sustained on other grounds. The judgment is modified to dismiss the complaint on the merits rather than for lack of jurisdiction, and, as so modified, is

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JUNE 22, 2001

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

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SOUTH AUSTIN COALITION COMMUNITY COUNCIL, WALTER E. RYAN, JR., THEODORE CHABRAJA, ANITA B. HULL, ROBERT RIFKIN and PATRICK STEFFES for themselves and for all others similarly situated,

Plaintiffs

v.

SBC COMMUNICATIONS INC. AND AMERITECH CORP.,

Defendants.

MEMORANDUM AND ORDER

Plaintiffs, South Austin Coalition Community Council, Walter E. Ryan, Jr., Theodore Chabraja, Anita B. Hull, Robert Rifkin, and Patrick Steffes (collectively, "plaintiffs") bring this one-count antitrust suit under section 16 of the Clayton Act, 15 U.S.C. § 26, to obtain injunctive relief of divestiture

and/or injunction enjoining the merger of Ameritech Corporation to SBC Communications ("SBC/Ameritech" or "SBC") alleging that the merger threatens to violate section 18 of the Sherman Act [sic.], 15 U.S.C. § 18 because the newly-merged corporation will have monopoly strength, and competition for local telephone service will be substantially lessened. SBC/Ameritech moves to dismiss the suit under Federal Rule of Civil Procedure 12(b)(1) on the basis that the plaintiffs lack standing. For the following reasons, the motion to dismiss the complaint is GRANTED.

I. *Motion to Dismiss*

When considering SBC's motion to dismiss under Fed. R. Civ. P. 12(b)(1), the dismissal is properly granted only if it is clear that no set of facts which the plaintiff could prove consistent with the pleadings would entitle him to relief. *See, Kunik v. Racine County, Wis.*, 946 F.2d 1574, 1579 (7th Cir. 1991) (motion to dismiss under 12(b)(6) for failure to state a claim); *Komorowski v. Townline Mini-Mart and Restaurant*, 162 F.3d 962, 964 (7th Cir. 1998) (per curiam) (motion to dismiss under 12(b)(1) for lack of jurisdiction). *See, e.g., McMath v. City of Gary*, 976 F.2d 1026, 1031 (7th Cir. 1992); *Gillman v. Burlington Northern R.R. Co.*, 878 F.2d 1020, 1022 (7th Cir. 1989). Dismissal is properly granted only if no set of facts which a Plaintiff could prove consistent with the pleadings would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Kunik*, 946 F.2d at 1579, *citing, Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984).

Appendix B

II. *Background*

The following facts are taken from plaintiffs' complaint and are assumed true for the purpose of ruling on the motion to dismiss.

A. The Parties

Since 1976, plaintiff South Austin has been a "grassroots community organization" dedicated to improving the quality of life for citizens in the Austin area. South Austin was also a customer of Ameritech at the time of the merger with SBC — as were all of the individually named plaintiffs.

SBC is a Texas corporation headquartered in San Antonio, Texas. In 1983, when AT&T was divested of its monopoly over local phone service, SBC was one of the seven regional bell operating companies ("RBOCs") which was formed by consent decree. *United States v. American Tel. & Tel.*, 552 F. Supp. 131 (D.D.C. 1982). Before the merger, SBC transacted business and served customers primarily in the southern and western states.

B. The Merger and Agency Reviews

Ameritech was a Delaware corporation and was headquartered in Chicago, Illinois. Ameritech was also an RBOC and it transacted business and served customers primarily in the midwest states.

On May 10, 1998, SBC and Ameritech agreed to merge their telephone service companies. The resulting corporation

will result in SBC having control of the local telephone service in twelve states which allegedly equates to 31% of the national telephone service market share.

On April 8, 1999, the Public Utilities Commission of Ohio (or, "PUC Ohio") issued an order that approved the merger subject to certain conditions.

On August 2, 1999, the Department of Justice (the "DOJ") and SBC entered into a consent decree which was approved in the United States District Court, District of Columbia. *See, United States v. SBC Comm. Inc., and Ameritech Corp.*, 1999 WL 121145 (D.D.C. August 2, 1999). The consent decree required SBC/Ameritech to divest themselves of ownership of cellular phone services in overlapping markets.

On September 23, 1999, the Illinois Commerce Commission (the "ICC") issued an order approving the merger subject to certain conditions.

Likewise, on October 6, 1999, the Federal Communications Commission an order approving the merger subject to certain conditions.

C. Previous Litigation

In January 1999, this court dismissed plaintiffs' original complaint because it was filed before the reviewing federal and state agencies were afforded the opportunity to review the merger. *See, South Austin Coalition Community Council, v. SBC Comm.*, 1999 WL 955910 (N.D. Ill. January 26, 1999), *aff'd*, 191 F.3d 842 (7th Cir. 1999).

III. *Applicable Law*

A. Clayton Act

Plaintiffs seek an injunction under the Clayton Act, alleging that the merger poses a threat of antitrust injury. Section 16 of the Clayton Act, 15 U.S.C. § 26, provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . .

B. Sherman Act

Plaintiffs specifically allege that the "threatened loss or damage by a violation of the antitrust laws" exists because the merger violates Section 18 of the Sherman Act, "Acquisition by one corporation of stock of another," which provides that:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in

> any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18.

Plaintiffs allege that the SBC/Ameritech merger poses a Sherman Act Injury because it gives SBC monopoly power, lessens competition, and poses high barriers to entry for competitors.

IV. *Discussion*

A. Standing Requirements Under the Clayton Act

A plaintiff may bring suit under both Sections 4 and 16 of the Clayton Act. Section 4 requires a plaintiff to demonstrate that he has suffered an antitrust injury to business or property. Clayton Act, § 4, 15 U.S.C. § 15. Section 16 of the Clayton Act, 15 U.S.C. § 26, provides that a plaintiff "shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . ."

In *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 107 S. Ct. 484 (1986), the Supreme Court noted that, unlike actions under § 4, a § 16 claim does not require a plaintiff to demonstrate actual injury, but only a showing of a "threatened" loss or damage. The threatened injury, though,

must be of the kind that the antitrust laws were designed to prevent. 479 U.S. at 111, 107 S. Ct. at 489-490. Standing under § 16 "requires proof of a threatened loss or damage by a violation of the antitrust laws." *Id.*, 479 U.S.C. at 111, 107 S. Ct. at 490; *see*, *O'Neill v. Coca-Cola Co.*, 669 F. Supp. 217, 221 (N.D. Ill. 1987) ("Thus, a plaintiff seeking standing under Section 16 must show a threatened antitrust injury which is proximately caused by conduct constituting an antitrust violation. Unless each aspect of this test is met, standing under Section 16 will not exist.") The Supreme Court reiterated this position in *California v. American Stores Company*, when it held that "[a] private litigant . . . must have standing — in the words of § 16, he must prove 'threatened loss or damage' to his own interests in order to obtain relief." 495 U.S. 271, 290, 110 S. Ct. 1853, 1867 (1990).

A. Agency Review and Conditions Imposed

SBC argues that this merger has been the subject of extensive agency review and substantial conditions have been implemented to secure consumer protection. Specifically, they argue that the FCC, the Ohio Public Utilities Commission ("Ohio PUC"), and the Illinois Commerce Commission ("ICC") reviewed and approved the merger and "each imposed substantial conditions promoting increased local competition." Further, SBC argues that the agency review followed the review conducted by the DOJ, which approved the merger subject to the condition that the two companies divest their cellular businesses which overlapped into each other's market.

Appendix B

1. The FCC Review

Both parties agree that the FCC reviewed the merger under the statutory public interest test. Under the Federal Communications Act, the FCC's determination under the public interest test requires the FCC to analyze if the proposed merger "demonstrated that the public interest would be served by transferring Ameritech's numerous licenses and lines used in interstate or foreign communications to SBC." *In re Applications of Ameritech Corp., Mem. Op. And Order*, DA 99-279, ¶ 46 (FCC Oct. 6, 1999). The public interest test required the FCC to inquire whether "on balance, the merger serves the public interest, convenience and necessity." *Id., see*, 47 U.S.C. §§ 214(a), 303(r), 310(d).

SBC hastens to add that the FCC's opinion stated that:

> "the Commission's analysis of public interest benefits and harms includes, but is not limited to, an analysis of the potential competitive effects of the transaction, as informed by traditional antitrust principles. While an antitrust analysis, such as that undertaken by the DOJ in this case, focuses solely on whether the effect of a proposed merger 'may be substantially to lessen competition,' the Communications Act requires the Commission to make an independent public interest determination, which includes evaluating public interest benefits or harms of the merger's likely effect on future competition." *See, FCC Order*, ¶ 49., *quoting*, 15 U.S.C. § 18 (Sherman Act).

Thus, "in order to find that a merger is in the public interest . . . the Commission must be convinced that it will enhance competition." *Id.* (quotations omitted). SBC argues that the FCC's review "imposed unprecedented and far reaching conditions on [SBC/Ameritech]" not only to see that competition was unharmed, but also set conditions that enhanced competition.

a. The FCC's Analysis and the Goals of the Conditions

The FCC noted that "unlike the role of the antitrust enforcement agencies, the Commission's public interest authority enables it to rely upon its extensive telecommunications regulatory and enforcement experience to impose and enforce certain types of conditions that tip the balance and result in a merger yielding overall positive public interest benefits." *Id.* at ¶ 52. To that end, the procedure to adopt conditions to the merger was conducted in the public forum "at which numerous citizens, representatives of citizen groups, and industry members spoke. The staff also met extensively in individual sessions, with dozens of individuals, groups and firms, both before and after the Applicants placed on the public record, for full public commentary, an initial version of their supplemental proffered conditions." *Id.* at ¶¶ 351-353.

As a result of the discussions and hearings, the FCC adopted, with modifications, conditions proffered by SBC. The conditions are effective for a period of 36 months after the date of the FCC's approval. The FCC's order stated that the conditions "are designed to accomplish five primary

public interest goals: (a) promoting equitable and efficient advanced services deployment; (b) ensuring open local markets; (c) fostering out-of-territory competition; (d) improving residential phone service; and (e) ensuring compliance with and enforcement of the conditions." *Id.* at ¶ 355.

The FCC stated that the conditions were not intended to "limit the authority of state commissions to impose or enforce requirements that go beyond those adopted in this Order." *Id.* at ¶ 358. Therefore, the door was left open for state regulators to further protect the interest of consumers by adopting conditions in addition to those in the FCC order.

b. The FCC's Conditions

The FCC order sets forth approximately thirty different conditions for its approval of the SBC/Ameritech merger. The conditions are wide-ranging and require SBC to take measures to improve service for consumers and promote open markets.

The conditions fall within five different areas: 1) promoting equitable and efficient advanced services deployment; 2) ensuring open local markets; 3) fostering out-of-territory competition; 4) improving residential phone service; and 5) ensuring compliance with and enforcement of the conditions.

Appendix B

i) Promoting Equitable and Efficient Advanced Services Deployment

Under this classification, SBC is required to meet several conditions. SBC must create "one or more separate affiliates to provide all advanced services (defined as inter/intrastate wireline telecommunications services (DSL services)) in the newly-merged SBC/Ameritech region." In its order, the FCC stated that this condition "will greatly accelerate competition in the advanced services market by lowering the costs and risks of entry . . ." *Id.* at 363. SBC's compliance will be subject to an annual audit. *Id.* at 365.

SBC must offer other carriers a surrogate line-sharing discount. The FCC's order explains that a line can be separated into a voice channel and an advanced series channel which can be carried simultaneously. Hence, "line sharing potentially enables each service to be provided by a different carrier." *Id.* at 369. While the conditions do not call for SBC to allow for line sharing with unaffiliated carriers, the FCC approved an interim solution that compels SBC to provide to other carriers a "second loop" to competitors at a substantial discount: "In this manner, the conditions require SBC/Ameritech to offer competing carriers the economic equivalent of line sharing until line sharing becomes available to unaffiliated carriers." *Id.*

Further, the conditions require SBC to "develop and deploy common electronic OSS [operations support systems] interfaces across all 13 SBC/Ameritech states to be used by any telecommunications carrier, including the merged firm's advanced service affiliates . . ." The FCC's order explained

that "this condition will guard against discrimination by the merged entity toward its rivals while, at the same time, lower those rivals' costs providing competing advanced services." *Id.* at 371.

SBC must also file with state commissions cost studies and proposed rates for conditioning loops used in the provision of advanced services. The FCC's order stated that the condition "is designed to ensure that SBC/Ameritech will not erect a barrier to the competitive deployment of advanced services by charging excessive rates for loop conditioning." *Id.* at 375. Further, SBC has agreed "[a]s a means of ensuring that the merged firm's rollout of advanced services reaches some of the least competitive market segments and is more widely available to low-income consumers, [it] will target their deployment of xDSL services to include low-income groups in rural and urban areas." *Id.* at ¶ 376.

ii) Ensuring Open Local Markets

The second classification of conditions, "ensuring local markets," was placed on the merger to promote competitiveness in local markets.

The "carrier-to-carrier performance plan" condition requires SBC to file performance measurement data for each of the thirteen SBC in-region states. The data will reflect SBC's performance of their obligations to their competitors in more than twenty measurement categories. *Id.* at ¶ 377.

Further, as part of these conditions, the FCC's order states that "effective, nondiscriminatory access to OSS

["Operations Support Systems"] is critical for achieving the 1996 [Federal Telecommunications] Act's local competition objectives." This requirement calls for SBC/Ameritech to "establish, in consultation with competitive LECs [local exchange carriers], uniform OSS interfaces and systems across their 13 in-region states that are based on the best practices . . . of the two companies." *Id.* at ¶ 381.

SBC will also "assist smaller competitors and new entrants by requiring [SBC] to recover electronic OSS costs on a strict usage basis rather than through a flat monthly fee." The effect of this condition will be to "eliminate any flat-rate, up-front charge for the right to use the company's standard electronic interfaces for accessing OSS (*i.e.*, flat-rate monthly charges for access to SBC's remote Access facility and Information Services Call Center, amounting to approximately $3,600 per month)." *Id.* at ¶ 384.

Further, "as a means of reducing the barriers to new entry in its region," SBC must "provide special OSS assistance to any 'qualifying' competitive LEC [less than $300m in total annual revenues]. Specifically, the merged firm will designate and make available for 36 months at no additional cost a team of OSS experts to assist these qualifying carriers with OSS issues." *Id.* at ¶ 385.

In response to concern from competing carriers that collocation costs have presented a formidable obstacle to entering the local service markets, SBC was required to "file a tariff or offer to amend interconnection agreements in each SBC/Ameritech state to demonstrate compliance with the Commission's collocation rules" before the date of the

merger. *Id.* at ¶ 386. Upon completion of the merger, the conditions provided for an independent auditor to present an audit report to the FCC. If the report revealed problems with SBC's collocation practices, the FCC could "decide to take additional action as deemed necessary and appropriate" to assure compliance.

The "most-favored nation" condition requires SBC to "facilitate market entry throughout SBC/Ameritech's region . . ." *Id.* at ¶ 388, First, SBC is required to offer competing telecommunications carriers "operating within its service area any interconnection arrangement or UNE ["unbundled network elements"] that SBC/Ameritech . . . secures." Second, "where it is feasible given technical limitations, SBC/Ameritech will make available to any requesting telecommunications carrier in any of its 13 states any Interconnection arrangement or UNE in any other of the same 13 states that was negotiated by an affiliate of SBC, subject to state-specific pricing." *Id.*

Further, "in addition to promoting market entry and assisting telecommunications carriers that want to operate in more than one SBC/Ameritech state, the conditions require SBC to offer to requesting telecommunications carriers an interconnection and/or resale agreement covering multiple SBC and/or Ameritech states . . ." *Id.* at ¶ 389. The FCC noted that this condition fosters competition because "negotiating a separate interconnection agreement between the same parties in multiple states can impose substantial unnecessary costs and delays on competitors and provides incumbent LECs (SBC/Ameritech) to game the process." *Id.*

Appendix B

The local market conditions also include a series of "carrier-to-carrier promotions." These conditions require SBC to: offer promotional discounts on the monthly charges for unbundled loops used in providing residential local service; offer a promotional resale discount on SBC/ Ameritech's retail telecommunications services, where the services are, in turn, resold to residential customers; and "offer end-to-end combinations of all network elements required to be unbundled as of January 24, 1999 to competitive LECs providing residential local service . . ." *Id.* at ¶¶ 391-393.

To ensure open local markets, SBC must also "continue to make available to telecommunications carriers each UNE that was available under SBC's and Ameritech's interconnection agreements as of January 24, 1999, even after the expiration of existing interconnection agreements . . ." The conditions also provide for alternative dispute resolution as a means of expediting "carrier-to-carrier disputes." *Id.* at ¶ 395. The FCC's order noted that "this process supplements, rather than supercedes, any other options at the carrier's disposal for addressing disputes with SBC or Ameritech . . ." *Id.* However, no state or CLEC (community local exchange carrier) is required to take part in the process.

Another condition to ensure open local markets requires SBC to provide shared transport to competitors "utilizing an advanced intelligent network software solution in each Ameritech state." *Id.* at ¶ 396. Shared transport refers to cable that connects facilities owned by different parties.

Further, SBC, "in order to provide information regarding possible options for additional competition in the provision of local service to multi-unit properties . . . will conduct a trial in five cities that will provide telecommunications carriers with access at a single point of interconnection to cabling owned or controlled by SBC-Ameritech" in multi-tenant residences and business properties. *Id.* at ¶ 397. Additionally, the conditions require SBC to "design and install all new cabling owned or controlled by SBC/Ameritech in a manner so that it can be accessed by any telecommunications carrier at a single point of interconnection . . ."

iii) Fostering Out-Of-Territory Competition

SBC must also, within thirty months of the merger closing date, "enter at least 30 major markets outside SBC's and Ameritech's incumbent service area as a facilities-based provider of local telecommunications services to business and residential customers." The FCC ruled that this condition will ensure that residential consumers and business customers outside of SBC/Ameritech's territory benefit from facilities-based competitive service by a major incumbent LEC. This condition effectively requires SBC and Ameritech to redeem their promise that their merger will form the basis for a new, powerful, truly nationwide multi-purpose competitive telecommunications carrier. We also anticipate that this condition will stimulate competitive entry into the SBC/Ameritech region by the affected incumbent LECs." *Id.* at ¶ 398. Thus, SBC is required to enter into outside markets in an effort to spur competition among carriers nationwide. SBC must pay $110,000 per day for each missed "entry

requirement." *Id.* at ¶ 399. Therefore, "SBC would . . . be obligated to pay $39.6 million if it missed all 36 entry requirements in a market, or nearly $ 1.2 billion for missing the entry requirement in all 30 markets." *Id.*

iv) Improving Residential Phone Service

The FCC order states that "as a direct benefit to consumers, particularly low-income consumers and low-volume long distance callers . . . SBC/Ameritech will not charge residential customers a minimum monthly or minimum flat rate charge for long distance service for a period of not less than three years. This requirement should not only benefit those customers that make few long distance calls, but also should help to ensure that long distance services continue to be available to all consumers at competitive prices." *Id.* at ¶ 400.

In another condition "designed specifically to ensure that the benefits of the merger extend to low-income residential customers throughout all of SBC's and Ameritech's regions . . . [SBC must] offer each of its 13 in-region states a plan to provide discounts on basic local service for eligible customers . . . Specifically, SBC/Ameritech will offer to provide a discount equal to the price of basic residential measured rate service, excluding local usage, in each state, up to a maximum discount of $10.20 per month . . ." *Id.* at ¶ 401.

Further, "to promote affirmative service quality improvement," SBC must make quarterly reports about the quality of service that it provides to customers. *Id.* at ¶ 403. The FCC's order states that "by receiving such information

on a quarterly basis, the Commission and others can take appropriate action in the event such reports show service quality degradation." *Id.* at ¶ 404.

v) Ensuring Compliance with and Enforcement of the Conditions

Stating that "attaching conditions to a merger without an efficient and judicious enforcement program would impair the Commission's ability to protect the public interest," the FCC established compliance mechanisms to ensure that the merger conditions are being satisfied.

The FCC's order calls for the implementation of a compliance program "to identify all applicable compliance requirements, establish and maintain the internal controls needed to ensure compliance, evaluate the merged firm's compliance on an on-going basis, and take any corrective actions necessary to ensure full and timely compliance." *Id.* at ¶ 408.

While the FCC order states that it wants SBC to be self-policing over its compliance with the merger conditions, it also stated that "the Commission plans to conduct target audits of various aspects of the Applicants' compliance programs. Only a strong corporate compliance program in conjunction with the independent audit and other enforcement mechanisms, will enable consumers to realize the full benefit of the conditions." *Id.* at ¶ 409. These measures include retaining an independent auditor to conduct an annual audit and a final report. *Id.* at ¶ 410. The FCC's order states that "the independent audit requirement

establishes an efficient and cost-effective mechanism for providing reasonable assurances of SBC/Ameritech's compliance with its obligations under the conditions." *Id.* at ¶ 412.

As to the compliance measures, the FCC stated that "we expect that this heavy burden of persuasion, coupled with the compliance mechanisms and significant financial exposure, will ensure that the public enjoys the full benefits of these conditions in a timely manner." *Id.* at ¶ 414. The FCC also noted that "the enforcement and compliance programs established in these conditions in no way supercede or replace the Commission's enforcement and investigative powers, but merely supplement our usual process. The Commission may, at its discretion and subject to its normal procedures, take additional enforcement action against SBC/Ameritech for failing to comply with any provision of this Order . . ." *Id.* at ¶ 415.

The conditions set forth in the FCC's order expire within thirty-six months after the merger is complete. *Id.* at ¶ 416.

c. FCC's Conclusion

The FCC's order concluded that with the conditions adopted, "the merger of SBC and Ameritech is likely to be beneficial for consumers and spur competition in the local and advanced services markets. Given that the conditions will subsequently mitigate the potential public interest harms of the proposed merger and will result in affirmative public benefit, we conclude that [SBC] has demonstrated that the proposed merger, on balance, will serve the public interest,

convenience and necessity." *Id.* at ¶ 419. Thus, the FCC, in its review, concluded that, with the imposition of the aforementioned conditions, the SBC/Ameritech merger would be beneficial to consumers.

2. The Ohio Public Utilities Commission Review of the Merger

On April 8, 1999, the Ohio PUC issued an opinion and order which approved the SBC/Ameritech merger after a period of negotiations, discovery, and public commentary by several community organizations, associations, corporations, and the city of Toledo. The Ohio PUC also imposed some requirements before approving the merger, some of which are nearly identical to the FCC's list of conditions.

a. Ohio PUC Scope of Review

The Ohio PUC reviewed the SBC/Ameritech merger to determine whether it would "promote public convenience and result in the provision of adequate service for a reasonable rate, rental, toll, or charge." *In the Matter of the Joint Application of SBC Communications Inc., SBC Delaware, Inc., Ameritech Corp., and Ameritech Ohio for Consent and Approval of a Change of Control*, Case No. 98-1082-TP-AMT (Ohio Pub. Util. Comm'n April 8, 1999).

Appendix B

b. Conditions Imposed by the Ohio PUC.

i) OSS Conditions

SBC/Ameritech agreed to enter into certain stipulations and conditions required for the Ohio PUC's approval. The first class of conditions concern OSS. Within this set of conditions, SBC agreed with the Ohio PUC: to establish collaboratives to implement access to OSS in Ohio, especially to benefit new, smaller carriers; provide assistance, at no cost, to small carriers in Ohio for training and assistance for a period of four years following the merger. *Id.* at 14-16.

ii) Service Quality

Second, acknowledging the concern of the Ohio PUC about the potential for service quality to slacken, SBC has agreed to meet or exceed a service quality test, provide quarterly reports, and "conduct a series of studies as to the causes of non-telephone households in its service territory." *Id.* at 14-15.

iii) "Carrier-to-Carrier" Activities

A third set of conditions regard "carrier-to-carrier" activities. These conditions include an alternative dispute resolution process available to competing carriers. The Ohio PUC acknowledged that the process will not always create binding results, but it will be effective to "enable parties to focus more on reaching quick resolutions to problems, as opposed to pursuing litigation. That is a public benefit." *Id.* at 17.

The "carrier-to-carrier" conditions also provide for three promotions that SBC must offer to competing carriers: 1) UNE-loops "not purchased as a part of an Ameritech Ohio local switching combination;" 2) promotions for services resold to new carriers for their residential customers; 3) collocation promotions that require SBC to: install collocation requests within 90 days of the request, refund the pre-paid amount if the installation is not performed within 120 days, meet certain technical requirements, and reduce the prepaid rates; and lowered charges and payment options for access and service. *Id.* at 17-22.

iv) "Market Power"

The "market power" conditions require SBC to provide the Ohio PUC "with an assessment of competition and market power for a period of seven years . . ." *Id.* at 22. Further, "in the event that Ameritech Ohio does not demonstrate that it lost 200,000 residential access lines within four years of closing the merger. It will pay $15 million to its end users and [new carriers], $2.5 million to [Ohio's] education fund, and $2.5 million to [Ohio's] technology fund." *Id.* The Ohio PUC stated that these measures will mitigate SBC's market power and promote competition among the carriers.

v) The "Infrastructure" and "In-State" Conditions.

The "infrastructure" stipulation requires SBC to "invest at least $1.32 billion in Ameritech Ohio's local service infrastructure and network over the three years following the year in which the merger closes." *Id.* at 25.

Further, the "in-state presence" condition requires SBC to "maintain a state headquarters in Ohio for at least five years after the merger closing, maintain the number of full-time equivalent employees for two years, improve its customer-interfacing employees expertise, and regularly report the numbers of customer-interfacing employees for two years." *Id.* at 26. The Ohio PUC stated that the terms of this condition would be sufficient to provide adequate service to customers and competitors. *Id.* at 27.

vi) The "Books and Records" Condition

Under the "books and records" condition, SBC must provide its books and records to "any affiliate that engages in transactions with any SBC/Ameritech affiliate that operates in Ohio as a public utility." *Id.* at 29. The Ohio PUC held that this condition will allow them to ensure compliance with the terms of the merger. *Id.*

c. The Ohio PUC Conclusion

The Ohio PUC concluded that "the merger, under the terms of the [conditions] will promote the state's telecommunications policy, competition, diversity, and customer choice." *Id.* at 35, 40. It stated that the conditions imposed upon the merger resulted from "serious bargaining among capable, knowledgeable parties." *Id.* at 40.

3. The Illinois Commerce Commission's Review of the Merger

On September 23, 1999, the ICC issued an order approving the merger. The ICC's opinion followed evidentiary hearings held in January 1999, and interventions filed by corporations, associations, community organizations, the Illinois Attorney General, Cook County, the City of Chicago, and the ICC Staff. Several of the intervenors filed both initial and reply briefs. *SBC Communications Inc., SBC Delaware Inc., Ameritech Corporation, Illinois Bell Telephone Company d/b/a Ameritech Illinois and Ameritech Illinois Metro, Inc.*, 98-0555 (Illinois Commerce Comm'n September 23, 1999).

a. ICC Scope of Review

In its order, the ICC stated it "shall not approve the proposed reorganization of a public utility if it finds that the reorganization will adversely affect the utility's — in this case, [SBC's] — ability to perform its duties under the [Public Utilities Act]." *Id.* at 7.

b. The ICC's Conditions On Approval of the Merger

The ICC's order states that "the record . . . reveals that conditions to our approval need to be imposed in order to protect the interests of the Company and its customers."

Several of the conditions the ICC imposed are similar to those imposed by the Ohio PUC: SBC must maintain headquarters in-state for at least five years; infrastructure

modernization; OSS reports; OSS services and access to CLECs; state agency access to books and records; and enforcement and compliance measures with monetary damages as a consequence for non-compliance. SBC also agreed with the ICC to several other conditions to foster and promote competition and consumer protection.

i) "Interconnection Agreements"

SBC must meet several "interconnection commitments." Interconnection condition "A" requires: SBC to provide to Illinois CLECs services, facilities, or interconnection agreements/arrangements offered by SBC ILEC ["incumbent local exchange carriers"] affiliates in their in-region states subject to certain conditions. The ICC held that the condition is "valuable to CLECs and the expansion of the competitive market in Illinois . . ." *Id.* at 246-47. This condition also requires SBC to make optional payment plans available to CLECs for non-recurring charges. *Id.* at 247.

Interconnection condition "B" requires SBC to "convene a workshop or collaborative process with Staff and CLECs to discuss the UNEs, services, facilities or interconnection agreements." *Id.* at 248.

Interconnection condition "C" requires that SBC "shall provide . . . information regarding all interconnection agreements from other states to the [ICC] . . ." *Id.* at 249. The ICC explained that "this condition will make information available that may be useful to the [ICC] . . . during the collaborative process . . . to monitor [SBC's] continued compliance with the condition of offering agreements from other states in Illinois." *Id.* at 249-250.

Interconnection condition "D" provides that "if a CLEC affiliate of [SBC] obtains a UNE or interconnection arrangement from an [ILEC] through negotiation of that arrangement or through arbitration initiated by the [SBC] CLEC under 47 U.S.C. § 252, then [SBC] shall make available to requesting CLECs in Illinois, through good-faith negotiation, the same UNE or interconnection arrangement of the same terms (exclusive of price)." *Id.* at 250.

ii) "Shared Transport" Conditions

The ICC imposed a series of "shared transport" conditions. The conditions required SBC to provide shared transport to CLECs, first on an interim basis, then — within one year of the merger — the conditions require SBC to have a long-term solution. *Id.* at 250-253.

c. The ICC's Conclusion

The ICC's order concluded that "with the adoption of the conditions set forth herein, the proposed reorganization will not adversely affect the ability of [SBC] to perform its duties under the Illinois Public Utilities Act." *Id.* at 261.

C. Do Plaintiffs Show a Threat of Antitrust Injury arising out of the SBC/Ameritech Merger to Warrant Standing under 15 U.S.C. § 26?

Plaintiffs argue that they have successfully pled a threat of antitrust injury as a result of the SBC merger. First, they claim that their complaint pleads a threatened loss by "the recombination [of] the RBOCs and their exercise of

monopoly power." Plaintiffs argue that the merger: will create the nation's largest local phone company; expands SBC's service area to cover two-thirds of the U.S. population; puts SBC first among U.S. telecommunications companies in terms of access lines; makes SBC the largest non-European telecommunications company in Europe; re-combines three of the seven regional bell operating companies ("RBOCs") which frustrates the purpose of breaking up the AT&T telephone industry monopoly over twenty-five years ago; provides SBC monopoly power within the new geographic area; provides SBC with 31% of the telephone access line market in the United States.

Second, plaintiffs argue that it pled a threat of an antitrust injury by the barriers to CLECs entering into the market leading to a lack of competition to [SBC]. The corresponding allegations in their complaint state that "while [CLECs] are growing, they still only controlled less than 1% of local telephone lines." Further, plaintiffs assert in their complaint that the FCC's order did not accurately depict the CLECs market strength.

Third, plaintiffs argue that they have pled a threatened antitrust injury by alleging that the merger creates a highly-concentrated marketplace, "indicating an antitrust violation . . ." Plaintiffs specifically allege, that according to the HHI ("Herfindahl-Hirschman Index"), the merger drastically increases market concentration for local telephone services.

Finally, plaintiffs, in their response, argue that their complaint alleges a threat of antitrust injury through less actual and potential competition. Plaintiffs allege that the

merger eliminates what it calls a "substantial present likelihood" that SBC and Ameritech were going to be competitors. Therefore, the merger unravels whatever potential competition may have occurred between the two companies. Plaintiffs object that the FCC did not impose, as a condition of the merger, a requirement that other RBOC's enter SBC/Ameritech's service area.

SBC responds that plaintiffs have raised only speculative arguments and do not demonstrate a threat of an antitrust injury resulting from the merger. SBC contends that plaintiffs' allegations ignore the analysis of the three regulatory agencies which have thoroughly reviewed the merger and set conditions upon it that seek to foster the growth of competition and protect consumers. Specifically, referring to the FCC's review, SBC notes that the conditions the agency imposed "applied the public interest standard not only to prevent harms covered by the Clayton Act but also to facilitate the development and enhancement of competition within and outside the local service areas served by the merging companies."

Plaintiffs do not account for the conditions placed on the merger by the reviewing regulatory agencies and attempts to argue that an antitrust threat exists as though the conditions SBC entered into were not a factor in this court's determination of plaintiffs' claims. This court, does, however, rely on the agencies' decisions in its determination of whether plaintiffs have standing to bring this suit under 15 U.S.C. § 26. *See, SACCC I*, 191 F.3d at 845.

Appendix B

Plaintiffs' complaint is only an invitation for the court to marvel at the size of the SBC/Ameritech merger and conclude that it must automatically present a threatened antitrust injury sufficient to confer standing to them under the Clayton Act. Put another way, plaintiffs argue that they have standing by simply alluding to the proportions of the merger, and leaving it to the court to infer a threat of an antitrust violation simply because the merger is now a fact. Doing so would signal an automatic vote of no confidence to the three regulatory agencies, whose thorough examination of the merger crafted a solution that did more than ensure that competition did not suffer as a result, but saw to it that competition thrived.

It is not the court's holding that because this merger was reviewed by the three agencies, the court automatically defers to their conclusions. However, in light of their determinations, coupled with the fact that plaintiffs only allege merely speculative and vague claims that the SBC/Ameritech merger threatens an antitrust injury, the court concludes that plaintiffs have not made a showing for standing under section 16 of the Clayton Act.

CONCLUSION

For the foregoing reasons, defendant SBC's motion to dismiss Plaintiffs' complaint is GRANTED. IT IS SO ORDERED.

s/ Blanche M. Manning
Blanche M. Manning, U.S.D.J.

Dated: 6/22/01

Appendix B

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Minute Order Form (06/97)

Name of Assigned Judge or Magistrate Judge:
Blanche M. Manning

Case Number:
99 c 7232

Date:
June 22, 2001

Case Title:
South Austin Coalition Community Council v. SBC Communications, Inc.

* * *

Docket Entry:

* * *

(10) ■ [Other docket entry] For the reasons stated in the attached memorandum and order, defendant SBC's motion to dismiss [11-1] plaintiffs' complaint is GRANTED for lack of standing. IT IS SO ORDERED.

* * *

Appendix B

✓ Notices mailed by judge's staff.

* * *

Courtroom deputy's initials:
RTS

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED FEBRUARY 4, 2002

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

February 4, 2002

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

Hon. TERENCE T. EVANS, Circuit Judge

No. 00-3864

SOUTH AUSTIN COALITION COMMUNITY COUNCIL, *et al.*,

Plaintiffs-Appellants,

v.

SBC COMMUNICATIONS INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Illinois, Eastern Division.

No. 99 C 7232
Blanche M. Manning
Judge.

Appendix C

ORDER

Plaintiffs-appellants filed a petition for rehearing and rehearing en banc on January 2, 2002. No judge in regular active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Chief Judge Flaum and Judge Williams did not participate in the consideration of the petition for rehearing en banc.

APPENDIX D — RELEVANT STATUTE

15 U.S.C.A. § 18

§ 18. Acquisition by one corporation of stock of another

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to persons purchasing such stock solely for investment and

not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier

where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Power Commission, Surface Transportation Board, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Board, or Secretary.

APPENDIX E — EXCERPTS FROM MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION ADOPTED OCTOBER 6, 1999 AND RELEASED OCTOBER 8, 1999

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 98-141

In re Applications of

AMERITECH CORP.,

Transferor,

AND

SBC COMMUNICATION INC.,

Transferee,

For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: October 6, 1999 **Released: October 8, 1999**

* * *

77. We find that, with respect to the mass market for local exchange and exchange access services, SBC and Ameritech have the capabilities and incentives to make each firm a most significant market participant in particular markets in each other's regions. First, as described in Appendix B, prior to the announcement of the proposed merger, SBC and Ameritech had plans to enter other incumbent LECs' regions, including each other's. Second, as incumbent LECs, SBC and Ameritech have certain advantages when expanding out-of-region that other potential local service market entrants lack.

78. *Ameritech's Out-of-Region Plans.* We find that Ameritech is not only a most significant market participant in SBC's territory but also, as described in Appendix B, had both the incentives and capabilities to become a significant market participant in the St. Louis mass market for local exchange and exchange access service. The fact that Ameritech, prior to merger negotiations, had not begun offering commercial local wireline services out-of-region to the general public does not establish that Ameritech lacked the capabilities and incentives to expand. As described in greater detail in Appendix B, we find that, but for the merger, Ameritech would have implemented Project Gateway and entered the St. Louis residential market. In project Gateway, Ameritech's cellular company in St. Louis planned to offer local service as part of a bundle first to residential, and then to small business customers.[159] Applicants concede that uncertainties created by the planned merger were among the

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159. *See* Appendix B (Summary of Confidential Information and Conclusions).

reasons for placing Project Gateway on hold.[160] In addition, in testimony before the Illinois Commerce Commission, Ameritech admitted that it would have proceeded with the launch of Project Gateway had it not been for the merger.[161] Specifically, Ameritech's internal documents show that the firm had already announced its intention to enter SBC's St. Louis market, and was actively implementing those entry plans at the time the merger was announced.[162] Once the proposed merger was announced, Ameritech suddenly abandoned these plans.[163]

79. Ameritech offers conceivable reasons for canceling Project Gateway besides the merger, but many or all of them had existed for a long time without causing it to be cancelled,[164] Also, whatever the merits of these reasons, none

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160. *See* SBC/Ameritech July 24 Application, Description of the Transaction at 71-72.

161. *See* Appendix B (Summary of Confidential Information and Conclusions).

162. *See id.*

163. *See* SBC/Ameritech July 24 Application, Description of the Transaction.

164. Among other reasons for canceling Project Gateway, Ameritech argues that projections indicated financial losses due in part to the increased competition in the St. Louis market for mobile services. This justification nevertheless is tied to the merger, as Ameritech states that the significance of these financial losses was to diminish the attractiveness of its cellular assets in St. Louis to

(Cont'd)

of them is described in contemporaneous documents as *the* reason, or even *a* reason, for the cancellation. Indeed, there is no stated reason for the cancellation and no statement of a simultaneous event provoking cancellation in the documents Ameritech has provided to us. What did, in fact, occur simultaneously with the cancellation of Project Gateway was the agreement of Ameritech and SBC to merge. We conclude that Project Gateway was cancelled because SBC and Ameritech preferred to merge rather than compete in the mass market for local exchange and exchange access services in St. Louis and perhaps elsewhere.[165]

* * *

81. We disagree with Ameritech that its entry into St. Louis would have had a limited impact on that market. We find that absent the merger, it is highly likely that Ameritech ultimately would have made Project Gateway facilities-

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(Cont'd)

potential buyers of those assets given the "substantial probability" that the assets would need to be divested to satisfy antitrust and regulatory authorities. Ameritech also points to implementation problems (billing, pricing, and order processing) and notes that fixing them would have taken significant resources. Finally, Ameritech notes that, contrary to predictions, its new mobile competitors did not enter with a bundled service offering. Ameritech argues that this removed the need for a defensive offering such as Project Gateway. *See* Appendix B (Summary of Confidential Information and Conclusions), *See also* SBC/Ameritech July 24 Application, Description of Transaction at 71-72.

165. *See* Appendix B (Summary of Confidential Information and Conclusions).

based.[168] Although Ameritech initially relied on resale, this is typical of initial entry moves by competitive LECs. A competitive LEC's entry by resale may be a necessary first step to facilities-based competition. It is not *per se* a disavowal of it. In fact, Ameritech's documents indicate that it was considering facilities-based competition when it achieve sufficient scale to justify the related expenditure in capital,[169] and that it began several steps that, if completed, would have made it a facilities-based competitor in St. Louis.[170] Furthermore, we find that Ameritech's assertion that it lacks brand name recognition in St. Louis has no credibility. Ameritech had been aggressively promoting and providing its cellular service in St. Louis, under the Ameritech brand name, for many years. Ameritech's own documents show that it believed it had a strong brand name in St. Louis and that its brand name would enable it to compete effectively in the local service market there.[171] Finally, it is significant to our analysis that SBC considered Ameritech to be a potential facilities-based provider of local service to the Missouri consumer market[172] with strong brand name recognition.[173]

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168. *See id.*

169. *See id.* Ameritech documents indicate that it considered facilities-based entry for several out-of-region endeavors.

170. *See* Appendix B (Summary of Confidential Information and Conclusions).

171. *See id. See also* Sprint Oct. 15 Petition at 16-17.

172. *See* Appendix B (Summary of Confidential Information and Conclusions).

173. *See id.*

Therefore, we conclude that Ameritech is a significant market participant in the mass market for local exchange access services in St. Louis.[174]

82. *SBC's Out-of-Region Plans.* The evidence indicates that SBC is a potential entrant for mass market local exchange and exchange access service in Ameritech's region.[175] The evidence in the record indicates that SBC had plans to enter the mass market in Chicago, building off its cellular base in that city, and could thus be viewed as a potential entrant into this market.[176] Support for this argument comes

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174. *See id. See also* Sprint Oct. 15 Petition, Decl. of John B. Hayes at 28-31; Focal Oct. 15 Comments at 14; CPI Nov. 16 Reply Comment at 7; Consumer Federation of America/Consumers Union (CU/CFA) Nov. 16 Reply Comments at 3; Report of Gregory L. Rosston & Matthew G. Mercurio, An Economic Analysis of the SBC-Ameritech Merger at 15 (April 26, 1999), attach. to Attorneys General of Indiana, Michigan, Missouri, and Wisconsin Apr. 27 *Ex Parte* (filed April 27, 1999) (State Attorneys General Apr. 27 *Ex Parte*, Rosston & Mercurio Report).

175. *See* Appendix B (Summary of Confidential Information and Conclusions).

176. Baldwin and Golding argue SBC's Rochester experience (discussed in para. 78, *infra*) is not a good predictor of success in Chicago. The Consumer Coalition Oct. 15 Comments, Aff. of Susan M. Baldwin and Helen E. Golding at 38. Chicago, unlike Rochester, has many corporate headquarters whose telecommunications managers are familiar with SBC. Rosston & Mercurio argue that SBC is a potential entrant into Chicago since it has unique expertise, experience, operating systems, unique value, adjacency, brand name and facilities. *See* State Attorneys General Apr. 27 *Ex Parte*, Rosston & Mercurio Report at 19-20. *See also* CU/CFA Nov. 16 Reply Comments.

from SBC's own statements. For instance, in October 1996, SBC's James S. Kahan testified in the California SBC/PacTel merger proceeding that SBC had certain entry advantages in the Chicago market and therefore it "would make sense to enter the local exchange market in Chicago but not in Los Angeles." Kahan stated:

> In Chicago, we have an extensive wireless network consisting of 10 switches and over 600 cell sites. That network also includes extensive backbone network of microwave, leased facilities, and connections to a SONET ring. This network is supported by a sophisticated billing system, a responsive care unit, as well as sales and distribution marketing, accounting, finance, installation and maintenance and other personnel who reside in and understand the Chicago market. In addition, we have a well recognized brand name since we operate under the Cellular One name in Chicago. We also have a large existing customer base to which we send bills every month and to whom we could market services.[177]

83. We conclude that SBC was a significant potential entrant into Ameritech's region; SBC disagrees. SBC argues that Rochester, New York, was a first experiment in out-of-region competition in local services, and that the experiment failed, ending out-of-region planning. Nevertheless, we base

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177. Rebuttal Testimony of James S. Kahan (SBC), In the Matter of the Joint Application of Pacific Telesis Group and SBC Communications for SBC to Control Pacific Bell, Cal PUC Docket No. 96-05-038 (Cal. PUC Oct. 15 1996).

our conclusion in part on our analysis of the ability of SBC to pursue out-of-region opportunities using, in this instance, its out-of-region cellular assets. In addition, although it had no existing plans to enter out-of-region territories at the time of the merger, SBC's internal documents indicate the company contemplated such entry when the competitive landscape became clear, as discussed in Appendix B.[178] Therefore, we conclude that SBC had the incentives to make it a significant potential market participant in the mass market for local service in out-of-region markets such as Chicago. Significantly, Ameritech also perceived SBC's potential entry into Chicago as a competitive threat to Ameritech.[179]

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178. *See* Appendix B (Summary of Confidential Information and Conclusions).

179. *See* Appendix B (Summary of Confidential Information and Conclusions) citing State Attorney's General Apr. 27 *Ex Parte*, Rosston & Mercurio Report at 19.